IN THE HIGH COURT OF HIMACAL PRADESH, SHIMLA.

RSA No.84 of 1995

Judgment reserved on: 20.12.2006

Date of decision: January 1, 2007

Thailu Ram	…….	Appellant
Versus		
Kataki and others	…….	Respondents

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The Hon'ble Mr. Justice V. K. Ahuja, J.

Whether approved for reporting?

For the appellant : Mr. R. K. Sharma, Advocate.

For the respondents : Mr. R. K. Gautam, Sr. Advocate with Mr. Naveen K. Bhardwaj, Advocate.

V. K. Ahuja, J.

This is a second appeal filed by the appellant against the judgment and decree of learned Additional District Judge, Kullu, dated 2.1.1995, vide which the appeal filed by the appellant against the judgment and decree of the Court of learned Senior Sub Judge, Kullu, dated 7.4.1992, was dismissed.

Briefly stated the facts of the case are that the appellant-plaintiff filed a suit for possession by specific performance of contract against defendants No.1 to 4. It was the case of the plaintiff that defendant No.1 was the owner in possession of 1/4th share measuring 8 bighas, 12 biswas and 5 biswancies as detailed in the plaint. On 19.8.1987, defendant No.1 had agreed to sell the suit land in favour of the plaintiff for Rs.15,000/-. A sum of Rs.12,000/- was paid as advance to defendant No.3 and balance amount of Rs.3,000/- was payable at the time of execution of the sale deed. It was to be executed within three years. The plaintiff had been ready and willing to perform his part of the contract and he requested defendant No.1 to execute the sale deed in his favour but

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Whether reporters of Local Papers may be allowed to see the judgment?

defendant No.1 on 16.5.1988 executed a gift deed in favour of defendants No. 2 to 4. Hence, the suit filed by the plaintiff.

Defendant No.1 admitted that she was the owner of the land but denied having executed any agreement in favour of the plaintiff or having received any consideration. The suit was tried by learned trial Court, who concluded that the plaintiff had failed to prove that valid agreement was executed in his favour by defendant No.1 and consequently, the suit was dismissed.

On an appeal, the learned First Appellant Court vide its detailed judgment dismissed the appeal filed by the appellant-plaintiff and upheld the findings of the learned trial Court that evidence adduced by the plaintiff can be given no credence and hence, the appeal was dismissed.

I have heard Mr. R. K. Sharma, learned counsel for the appellant and Mr. R. K. Gautam, Senior Advocate, for the respondents and have gone through the record of the case.

The submissions made by the learned counsel for the appellant were that there was sufficient evidence on record to prove the due execution of the agreement to sell in favour of the plaintiff by defendant No.1, but the learned First Appellate Court relied upon minor discrepancies and drew conclusion of its own in upholding the findings of the learned trial Court that agreement in question was not proved according to the law. It was submitted that the observations made by the learned First Appellate Court in regard to the evidence of the plaintiff were uncalled for and, as such, the evidence needs to be reappreciated by this Court. Another plea raised by the learned counsel for the appellant was that an application was filed by the appellant before the learned First Appellate Court for comparison of the thumb impression of the scribe i.e. defendant No.1 with her thumb impression, which application was wrongly rejected by the learned First Appellate Court, which has resulted in its

giving incorrect findings and, as such, the application deserves to be allowed and the case deserves to be remanded to learned trial Court.

On the other hand, the learned counsel for the respondents had submitted that since there are concurrent findings of both the Courts below, the evidence cannot be reappreciated by this Court. In regard to the application under Order 41 Rule 27 CPC filed by the appellant, it was submitted that the provisions of Order 41 Rule 27 CPC are not attracted to the present case. Sufficient evidence was available to the Court and such evidence would not be required for pronouncing the judgment. Thus, it was submitted that no case is made out for remanding the case to the trial Court for fresh decision according to law.

It is clear from a perusal of the judgment of the learned trial Court that it had referred to the evidence of the plaintiff in detail and had referred to the infirmities and contradictions in the statements of the witnesses of the plaintiff and accordingly, the evidence of the plaintiff was not relied upon. A perusal of the judgment passed by the learned First Appellate Court shows that it had considered the evidence of the plaintiff in detail and had given reasonings also in disbelieving the witnesses of the plaintiff and eight reasons have been given in disbelieving the evidence of the plaintiff led before the learned trial Court.

To substantiate his point that evidence cannot be reappreciated by this Court, the learned counsel for the respondents had referred to the following decisions:-

The decision in **Harvinder Singh and Others** vs. **Pritam Kaur and others** (2005) 11 SC Cases, 428 shows that it was observed by their Lordships of the Hon'ble Apex Court that no substantial question of law arising, and findings recorded by First Appellate Court being findings of fact, held, interference rightly denied by High Court.

The decision in **Madhvan Nair** vs. **Bhaskar Pillai** (2005) 10 SC Cases 553 shows that the First Appellate Court neither ignoring any material evidence nor considering any inadmissible evidence. In such circumstances, interference with the concurrent findings, held, not justified. It was further held, even an error on the part of the First Appellate Court in recording the finding of fact would not, itself , be a ground for High Court to upset the same.

The decision in **Veerayee Ammal** vs. **Seeni Ammal** (2002) 1 SC Cases 134 shows that in considering the question appreciated by evidence in second appeal, it was observed by their Lordships of the Hon'ble Apex Court that High Court cannot assume jurisdiction to interfere in second appeal just because another view is possible on appreciation of evidence.

Similar observations were made by their Lordships of the Hon'ble Apex Court in **Satya Gupta** vs. **Brijesh Kumar** (1998) 6 SC Cases 423, wherein it was held by their Lordships that where findings of fact of the lower Appellate Court are based on evidence, the High Court in second appeal cannot substitute its own findings on reappreciation of evidence merely on ground that another view was possible.

The decision in **Kashibai and Another** vs. **Parwatibai and Others** (1995) 6 SC Cases 213, shows that High Court has no jurisdiction to entertain a second appeal on ground of erroneous finding of fact, based on appreciation of relevant evidence.

A perusal of the record shows that the appeal was admitted by this Court on substantial question of law framed by the appellant. A perusal of the record shows that substantial question of law framed in regard to the merits of the case was as to whether the First Appellate Court was justified in casting doubts on agreement on the ground that it was written by an Advocate and

not by the Petition Writer. The another question raised was as to whether the Courts below were justified in rejecting the documentary and oral evidence as well as in rejecting the execution of the agreement. Thus, it cannot be said to be substantial question of law calling for a reappraisal of the evidence by this Court. Both the Courts below as mentioned above have discussed the evidence in detail and there are concurrent findings of both the Courts in regard to the validity of the agreement in question that the agreement in question was not proved according to the law and those findings do not call for any interference by this Court. It has not been pointed out by the learned counsel for the appellant during the course of arguments that some inadmissible evidence was considered by the learned trial Court or the learned First Appellate Court in giving its findings or there are valid reasons for reappraisal of the evidence by this Court. Thus, on merits of the case, no case is made out for reappraisal of the evidence when there are concurrent findings on facts of the case.

Coming to the second plea in regard to the application under Order 41 Rule 27 CPC, a perusal of the record shows that the application was rejected by the learned First Appellate Court vide its order dated 28.2.1994**.** It was observed by the learned First Appellate Court that there was direct evidence available on record to prove the agreement in question and in that event the examination of the thumb impression from the expert would not serve the purpose. Another reasoning given by the learned First Appellate Court was that it would not in any way help this Court to pronounce the effective judgment more specifically when the ample evidence of both the parties is on record. In ground of appeal, this plea was taken by the appellant and substantial question of law was also framed as to whether the learned First Appellate Court was justified in rejecting the application for comparison of the thumb impression of the scribe by an expert. In my opinion, in considering the application for additional evidence filed by the appellant, it has to be considered firstly, as to

whether the case is made out under Order 41 Rule 27 CPC or not for allowing the application. One of the grounds available was as to whether the evidence was not available or it is required for pronouncing the judgment. Both these conditions are not satisfied since the evidence was available and such evidence is not required for pronouncing the judgment since there is sufficient evidence on record which can be considered by the Court to pronounce the judgment. In my opinion, apart from these two considerations, it has to be seen as to whether such evidence is relevant and as to the effect in case such an application was allowed. It is not the question as to whether the thumb mark of the scribe was there or not, which is the only point to be considered by the Courts below, but the evidence was also discarded in regard to the contradictions and infirmities in the statements of the marginal witnesses as to whether they were present or not at the time of execution of the agreement. Thus, the case of the appellant will not be further substantiated by allowing such an application and the grounds given by the learned First Appellate Court are valid grounds and those findings do not call for any interference by this Court. To substantiate his point, that the application under Order 41 Rule 27 CPC cannot be allowed at this stage, the learned counsel for the respondents had relied upon the following decisions:-

The decision in **P. V. Subha Raja** vs. **S. S. Narayana Raja and others** AIR 1954 Madras 1074 shows that the additional evidence in second appeal to ascertain question of fact, cannot be admitted.

The decision in **Indira Balachandra Gokhale** vs. **Union of India and another** AIR 1990 Bombay 98 shows that inspite of ample opportunity, required evidence not produced before trial Court by party. It should not be allowed at appellate stage merely because if produced it could have tilted decision in its favour.

The decision in **Buta Singh and another** vs. **Jota Singh and another** AIR 1991 Punjab and Haryana 95 shows that production of additional evidence at belated stage is impermissible when there was no explanation as to why such evidence was not produced earlier.

The decision in **Balvant Yadneshwar** vs. **Srinivas Appaji Kulkarni** AIR 1959 Mysore 244 shows that it was observed that provisions of Order 41 Rule 27 CPC do not apply to second appeals.

All these above decisions support my view that the application filed by the appellant before the learned First Appellate Court cannot be allowed at this stage. There is no merit in the appeal and the findings of the learned First Appellate Court dismissing the appeal filed by the appellant are liable to be affirmed and are affirmed accordingly. The appeal filed by the appellant stands dismissed. However, parties are left to bear their own costs.

(V. K. Ahuja), J.

January 1, 2007.
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